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**CRIMINAL DOCKET**  
**UNITED STATES DISTRICT COURT**

DATE	PROCEEDINGS
12-15-69	Filed Indictment.
12-15-69	Bench warrant ordered.
12-22-69	Milton Adler Esq. assigned as Atty. Under CJA by U.S. Comm. Kessler of Counsel Deft. brought to Court on a Bench Warrant—Pleads not Guilty—Bail fixed in the sum of \$2,500—Deft. REMANDED in lieu of bail fixed. \$500. Bail fixed by Comm. exanarated. Jan 13, 1970 for Motions— MANSFIED, J.
12-29-69	Filed Warrant of Arrest and executed Dec. 19, 1969.
1-14-70	Trial Begun
1-15-70	Trial Continued and concluded. Jury Verdict Count 1—GUILTY, Count 2 GUILTY Count 3 NOT GUILTY. Defendant continued on present bail of \$2,500—REMANDED in lieu of bail fixed. Pre-sentence Investigation ordered. Sentence date 2-19-70 at 10:00 A.M.
1-27-70	Filed remand cited 12-22-69
1-30-70	Filed Notice of Motion for Judgment of Acquittal. Returnable Feb. 19, 1970.
2-5-70	Filed affdvt of THOMAS J. FITZPAYRICK, Asst. U.S. Atty in opposition to deft's motion to set aside the verdict of guilty and to dismiss the indictment, & memorandum of law. (sent to indictment. & memorandum of law. (sent to
2-19-70	Filed copy of Notice of motion filed 1-30-70 & memorandum of law & Deft's reply Brief.
2-19-70	Filed memorandum *** RE: for an order in arrest of Judgment or for a judgment of acquittal *** It is concluded that the congress could and did mean to reach cases like this one. Accordingly deft's motion is denied-so ordered FRANKEL, J. (mailed notice)
2-17-70	Filed Remand with Marshal's return.
2-19-70	Filed Judgment: It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIF-

## DATE

## PROCEEDINGS

- TEEN (15) MONTHS on each of counts 1 and 2, to run concurrently with each other. Defendant continued on present bail of \$2,500 until 4 P.M. on February 26, 1970 at which time the defendant is to surrender to the U. S. Marshal for service of sentence. FRANKEL, J.
- 2-19-70 Issued commitments and copies.
- 2-26-70 Deft. surrenders to U.S. Marshal for service of sentence 4 PM.
- 2-27-70 Filed order that the appellant be and hereby is granted leave to appeal in forma pauperis, and it is further ordered that a stenographic copy of the minutes of the trial be furnished to defense counsel at the expense of the Government FRANKEL, J. (mailed notice)
- 3-2-70 Filed affdvt. of Thomas J. Fitzpatrick, Asst. U.S. Atty for w/h/c Ad Pros.
- 2-27-70 Filed notice of appeal to the USCA from the judgment of 2-19-70
- 3-6-70 DENNETH BASS—Filed Writ of H/C Ad Pros. dtd. 3-2-70 & endorsed writ satisfied FRANKEL, J.
- 3-26-70 DENNETH BASS—Filed appearance bond in the sum of \$2,500.00 by Public Service Mutual Ins. Co., dtd. 2-10-70 before U.S. Commr. Bischoff.
- 4-14-70 Filed Commitment & entered return, Deft. Delivered to the Detention Hdqtrs HFO
- 4-21-70 Filed Transcript of record of proceedings, dated —1-14, 15 & 2-19-70
- 4-21-70 Filed CJA Voucher for compensation and expenses of appointed counsel. (Mailed orig. to Adm. Off. Wash. D. C.) MURPHY, J.
- 6-10-70 Filed order that bail bond, Amt. \$2,500, is exonerated. The security posted therefor may be transferred to the appeal bond herein ordered. Order S/ Judge Frankel.

A TRUE COPY

JOHN LIVINGSTON, Clerk

By *Illegible*

Deputy Clerk

TJF:rms  
55347

[filed Dec. 15, 1969]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

DENNETH BASS,

*Defendant.*

**INDICTMENT**  
69 Cr.

The Grand Jury charges:

1. On or about the 1st day of February, 1968, DENNETH BASS, the defendant, was convicted by a court of a state of the United States, to wit, the Supreme Court of the State of New York, Bronx County, of a felony, to wit, attempted Grand Larceny in the Second Degree, in violation of §§ 1296 and 2 of the Penal Law of New York.

2. On or about the 29th day of July, 1969, in the Southern District of New York, DENNETH BASS, the defendant, having been so convicted; unlawfully, wilfully and knowingly did possess a firearm, to wit, one (1) .32 caliber Baretta automatic pistol.

(Title 18, United States Code, Appendix § 1202(a)(1).)

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**SECOND COUNT**

The Grand Jury further charges:

1. On or about the 1st day of February, 1968, DENNETH BASS, the defendant, was convicted by a court of a state of the United States, to wit, the Supreme Court of the State of New York, Bronx County, of a felony, to wit, attempted Grand Larceny in the Second Degree, in violation of §§ 1296 and 2 of the Penal Law of New York.

2. On or about the 30th day of July, 1969, in the Southern

District of New York, DENNETH BASS, the defendant, having been so convicted, unlawfully, wilfully, and knowingly did possess a firearm, to wit, one (1) Stevens 12 gauge shotgun.

(Title 18, United States Code, Appendix, § 1202(a)(1) )

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55347

### THIRD COUNT

The Grand Jury further charges:

On or about the 29th day of July, 1969, in the Southern District of New York, DENNETH BASS, the defendant, unlawfully, and knowingly did carry a firearm during the commission of a felony which may be prosecuted in a court of the United States, to wit, the receipt, concealment and sale of a narcotic drug, in violation of Title 18, United States Code, §§ 173 and 174.

(Title 18, United States Code, § 924(c)(2) )

/s/ *Edmond Coffy*  
*Foreman*

/s/ *Robert M. Morgenthau*  
ROBERT M. MORGENTHAU  
*United States Attorney*

**EXCERPTS FROM TRIAL TRANSCRIPT**

(Jury present.)

THE COURT: All right, Mr. Fitzpatrick.

MR. FITZPATRICK: Thank you, your Honor. Your Honor, I believe Mr. Kessler wants the witnesses excluded. Is that correct?

MR. KESSLER: I was about to request that, your Honor.

THE COURT: All right.

(Some people left the room.)

MR. FITZPATRICK: Your Honor, Mr. Kessler, Madam Forelady, ladies and gentlemen of the jury:

As his Honor told you before, my name is Thomas Fitzpatrick and I represent the Government in this case.

His Honor previously outlined the indictment to you, and I just want to briefly describe it once again.

Count 1 charges that the defendant had been previously convicted of a felony in a New York State Court. The offense is that having been so convicted on or about the 29th day of July 1969, the defendant possessed a firearm, namely a 32-caliber Baretta automatic pistol.

Count 2 is similar, based on the same previous conviction and this count charges that on or about the 30th day of July, the following day, the defendant, having been so convicted, possessed a firearm, in this case a Stevens 12-gauge shotgun.

And the third count charges that on or about the 29th day of July 1969 the defendant carried a firearm during the commission of a felony and may be prosecuted in a United States Court, and that felony which it is alleged he was committing while he carried the firearm was the sale of narcotics in violation of a Federal statute.

Now, my purpose here is to just briefly outline to you what the Government intends to prove in the trial. As his Honor told you, the only evidence will be the statements that are made by the witnesses on that witness stand and any documents or physical evidence that is actually received into evidence. The evidence will come in in piecemeal fashion, and I would ask you to give your close attention to it. My purpose now is to just briefly outline what that evidence will show.

The Government will introduce this evidence through various agents of the Alcohol, Tobacco & Firearms Division of the Internal Revenue Service. Special Investigator George Jordan will testify that on July 29th and on July 30th he spoke to the defendant Denneth Bass, who is seated here, and on the second occasion actually there was an actual transfer of narcotics from Mr. Bass to Mr. Jordan. On the first occasion he was directed to another area of the building where he made a purchase of narcotics. In each case it is charged that the narcotic drug was heroin.

Mr. Jordan will also testify that on the 30th day of July, while he was on the premises, he observed the defendant carrying the Baretta automatic pistol which is mentioned in the indictment.

He will also testify that on the 31st day of July 1969—excuse me—on the 30th day of July 1969 he observed on the premises of the defendant's home the 12-gauge shotgun mentioned in the indictment.

You will also hear the testimony of Special Investigator Robert Patty, who found the two weapons that are charged in this indictment on the premises of the defendant's home. He will also testify to certain admissions or statements which the defendant made. You will also hear the testimony of Special Investigator Kenneth Coniglio, who placed the defendant under arrest.

And, finally, you will hear the testimony of a Government chemist who analyzed the substance which Mr. Jordan bought from the defendant. And I believe the testimony and the evidence will show that that substance was heroin.

I would ask you to listen very carefully to all the evidence and his Honor's instructions at the end of the case, and I think you will find at that time the Government has proven its case beyond a reasonable doubt.

Thank you.

MR. KESSLER: Your Honor, at this time I will not make any statement.

THE COURT: All right.

Mr. Fitzpatrick, do you want to call your first witness.

MR. FITZPATRICK: The Government's first witness, your Honor, is George Jordan.

GEORGE JORDAN, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Jordan, how are you employed?

A. I am employed as a special investigator, United States Treasury Department, Alcohol, Tobacco & Firearms Division.

Q. How long have you been so employed?

A. Over ten years.

Q. Directing your attention to July 28th, 1969, were you working on that day?

A. Yes, I was.

Q. In what capacity?

A. I was employed in my official duties as a special investigator, United States Treasury Department.

Q. Were you working in an undercover capacity on that day?

A. Yes, I was.

Q. In what area?

A. I was in the Bronx, in the vicinity of Fairmount Place.

Q. For what purpose?

A. I had received information that——

MR. KESSLER: Your Honor, I will object to that.

THE COURT: Sustained.

Q. Did you go to any particular place on that day?

A. Yes, I did. At about——

Q. Where did you go?

A. To the premises situated at 804 Fairmount Place, Bronx.

Q. At approximately what time?

A. It was in the evening, between 6 and 6:30.

Q. What did you do at that premises?

A. I went to this premises and knocked on the door and I asked for Dennis.

At that time a man now known to me as Denneth Bass came to the door.

I told him that I needed to purchase some narcotics.

And at that time he directed me to the basement of this building which was——

Q. Did he open the door and speak to you?

A. Yes, he did; he opened the door about six inches.

Q. Could you get a good view of him?

A. No, I couldn't get a good view of him; he held his body partially behind the door so that I could only see his face and his shoulder. I couldn't see half of his body at least.

Q. Will you continue as to what happened when you went downstairs?

A. I went downstairs to the basement entrance of the building, there at the door, which was, which had an iron gate in front of it, I knocked on the door, and a person came but he stayed in the shadows. I couldn't see who he was. I couldn't make out his physical description at all.

I told him that I wanted to buy a couple of bags. I asked him the price. And he told me \$2.

I told him I wouldn't like three bags. He said, "Well, give me the money."

I passed the money through the iron grate.

Q. Was that \$2 per bag?

A. \$2 per bag.

I passed the money through the iron grate, and he shortly returned and gave me three small glassine envelopes which were secured by a type of masking tape. And I left the premises at this time.

Q. What did you do with those three glassine envelopes?

MR. KESSLER: Your Honor, I will object to any further testimony in this area, unless there is a further connection to Mr. Bass or to the crime charged in the third count which is on a different date.

MR. FITZPATRICK: Your Honor, I will withdraw the testimony on this and continue with something which may be more orderly.

THE COURT: All right.

Q. Mr. Jordan, did you return to these premises on the following day?

A. Yes, I did.

Q. That would be July 29th?

A. That is correct.

Q. Approximately what time?

A. I believe this was in the afternoon, some time around 3, 3.30, something like that.

Q. Were you again in an undercover capacity?

A. Yes, again acting in an undercover capacity.

Q. What did you do?

A. Acting in the undercover capacity I again went to the premises; this time I carried with me a portable clock radio, Panasonic, and I went to the premises.

I knocked on the door and again asked for Dennis. Again a man now known to me as Denneth Bass came to the door.

I told him I was short of money and wanted to buy some more narcotics and would he exchange the radio for some narcotics. At this point he—there was a chain on the door which held it to a certain six-inch opening. He removed the chain and opened the door and admitted me to the premises. At this time—

Q. At this time did you get a good look at this man?

A. Yes, I did.

Q. Was there any doubt in your mind as to whether he was the same man you had seen the previous day?

A. He was the same man.

MR. KESSLER: Your Honor, may we fix which man he had seen on the previous day?

Q. Was he the same individual you saw when you initially went to the door and asked for Dennis?

A. He is the same individual which I initially saw on the first day.

Q. And not the man you saw when you went down to the basement?

A. That is correct.

Q. This man who to you was known as Dennis, do you see him in the courtroom today?

A. Yes, I do.

Q. Would you point him out, please?

A. He is the man sitting at the table with counsel; he has on a white shirt, dark coat and a blue and red tie.

MR. FITZPATRICK: May the record reflect that the witness has properly identified the defendant?

THE COURT: All right.

Q. What happened after you entered the premises, Mr. Jordan?

A. After I entered the premises, I noticed that the defendant had in his right hand a small automatic pistol which I later identified to be a Baretta automatic.

At this time he told me that he had to be very careful and that I shouldn't be afraid because I saw the gun but that he had to be careful because he was afraid of robberies or words to that effect.

At this time I offered him the radio, and he plugged the radio in and checked it to see if it was operable. It played.

And I asked him how much narcotics he would let me have for it.

At which time he said that he would let me have seven bags.

I agreed to that.

He went into the back portion of the apartment and returned with the seven bags of narcotics and gave them to me. I left the premises.

Q. And what did you do with those seven bags?

A. I put those seven bags in a franked envelope that our office has, and placed them in the evidence room at 120 Church Street.

Q. That was a separate envelope from which you had placed the three bags you had bought the previous day?

A. That is correct.

Q. Did you seal those envelopes?

A. Yes, I did.

MR. FITZPATRICK: May these be marked Government's Exhibits 1 and 2 for identification.

(Government's Exhibits 1 and 2 marked for identification.)

MR. FITZPATRICK: May this be marked Government's Exhibit 3 for identification.

(Government's Exhibit 3 marked for identification.)

MR. FITZPATRICK: And Government's Exhibit 4 for identification.

(Government's Exhibit 4 marked for identification.)

Q. Mr. Jordan, directing your attention to Government's Exhibits 1 and 2 for identification, do you recognize those?

A. Yes. Government's Exhibit 1 has my handwriting on it, which states—

Q. No. Without reading it, you do recognize it?

A. Yes.

Q. Is that the envelope into which you placed the three glassine bags you bought on the 28th of July?

A. Yes, it is.

MR. KESSLER: Your Honor, I still am going to object to any testimony as to that transaction.

THE COURT: What do we need that for, Mr. Fitzpatrick?

MR. FITZPATRICK: Your Honor, the chain of custody.

THE COURT: Is anything about the 28th admissible, and if so, on what ground?

MR. FITZPATRICK: The 28th was the date of the first purchase.

THE COURT: Yes, I know. But is there any charge with respect to that in the indictment?

MR. FITZPATRICK: No, there isn't, your Honor.

THE COURT: Is there some ground on which you think you ought to receive it?

MR. FITZPATRICK: Yes, your Honor. I think if for no other reason than to prove intent, and certainly a common scheme, your Honor. It is close enough in time.

MR. KESSLER: Your Honor, I have no objection to the testimony that is already in the record concerning the discussion between this witness and the defendant. However, any further exploration of matters between the witness and persons not known to us I think should be excluded.

THE COURT: Well, I will exclude it at this time on what I think is a discretionary subject. You can renew it later if you really think you need it.

MR. FITZPATRICK: Very well, your Honor.

THE COURT: It has been adequately identified?

MR. FITZPATRICK: Yes, your Honor.

THE COURT: Mr. Kessler, I assume that if I were to change my mind there would be no problem about the chain of custody, and so on, for which we would have to recall Mr. Jordan, or do you know?

MR. KESSLER: No, your Honor, there would not be.

THE COURT: All right. I will sustain the objection as of now.

MR. FITZPATRICK: Very well.

Q. Mr. Jordan, directing your attention to Government's Exhibit 2 for identification, do you recognize that?

A. Yes, sir, I do.

Q. Is that the envelope into which I placed the seven glassine bags that you bought on the 29th of July?

A. Yes, it is.

Q. Did you seal that envelope?

A. Yes, I did.

Q. Where did you place it?

A. I placed it, together with the purchase that I had made the previous day, in the evidence room.

Q. Directing your attention only to Government's Exhibit 2 for identification, you placed that in the evidence room, is that correct?

A. Yes, I did.

Q. Was that on the same day, on July 28th?

A. This purchase was made, the day—on the 29th.

Q. Excuse me. On July 29th, 1969.

A. Yes, I did. I placed this in the evidence room that same day.

Q. Did there come a time when you retrieved that exhibit from the laboratory?

A. Yes.

Q. Do you recall the date?

A. I believe it was in August, around August 20th, I believe it was, I went to the laboratory and retrieved this from the laboratory and replaced it in the evidence room.

Q. Was it sealed in the condition that it is in now?

A. It was just like this.

Q. Where did you place it?

A. Back in the evidence room.

Q. Directing your attention to Government's Exhibit 3 for identification, do you recognize that?

A. Yes, I do. This is the radio that I used on the 29th to purchase the seven bags of narcotics. I recognize it because it has a cigarette burn on the top.

MR. FITZPATRICK: I offer this.

MR. KESSLER: I have no objection.

(Government's Exhibit 3 for identification received in evidence.)

Q. Mr. Jordan, directing your attention to Government's Exhibit 4 for identification, do you recognize that?

A. Yes, I do.

Q. Is that the weapon you saw in the possession of Mr. Bass on July 29th?

A. That is correct.

Q. How do you recognize that?

A. When the weapon was seized, Special Investigator Patty—

MR. KESSLER: Your Honor, I object to this unless it is a little more certain that these events are in the knowledge of Mr. Jordan.

THE WITNESS: Yes, I observed Special Investigator Patty place his initial on the trigger guard of the weapon.

MR. FITZPATRICK: I offer it.

MR. KESSLER: Your Honor, may I inquire?

THE COURT: Yes.

# VOIR DIRE EXAMINATION

By MR. KESSLER:

Q. Where did the investigator put his initials?

A. It's a little difficult to see. I happen to know where it is, but the lighting is not too good. It's right in there (indicating). It is scratched in. It is at the junction of the trigger guard.

Q. I see something there. Is any initial on this part?

A. No, on this part there is no initial. Just on the guard itself.

MR. KESSLER: No objection to the gun. However, to the attached part I will object.

By MR. FITZPATRICK:

Q. Mr. Jordan, was this magazine enclosed in the gun at the time?

A. It was in the gun at the time. We only removed it to make the gun safe.

MR. FITZPATRICK: I offer both pieces.

VOIR DIRE EXAMINATION

By MR. KESSLER:

Q. Was it removed in your presence?

A. Yes.

Q. And attached to the gun in your presence?

A. I attached it.

MR. KESSLER: I have no objection.

(Government's Exhibit 4 for identification received in evidence.)

By MR. FITZPATRICK:

Q. Mr. Jordan, in the course of your duties as a special investigator with the Alcohol, Tobacco & Firearms Division, were you specially trained in the handling and identification of firearms?

A. Yes; we are.

Q. Could you tell what type of firearm that is?

A. This is what we call an automatic firearm. The caliber is 32.

Q. What make is it; do you know?

A. It's a Baretta, and it is written on here, "Baretta."

Q. Thank you.

Mr. Jordan, directing your attention to July 30th, 1969, did you return to the premises on that day?

A. Yes, I did.

Q. Approximately what time?

A. This was later in the evening, I would say close to eight o'clock.

Q. What happened on that occasion?

A. At this time I was in possession of an arrest and search warrant, and I was in the company of other special investigators of the Alcohol, Tobacco & Firearms Division. I went to the premises, knocked on the door—

Q. Were You by yourself at this time?

A. At this time I was by myself, and I was again acting in an undercover capacity.

I knocked on the door, and the defendant recognized me and admitted me to the premises.

Once I was in the premises—I had with me an 8-millimeter projector with which I had planned to discuss the exchange of narcotics with the defendant.

He admitted me into the bedroom of his premises. And we were sitting on the bed talking about the projector at that particular time. At this time I noticed on a night table, situated at the head of the bed, a sawed-off shotgun.

While we were discussing the projector the other investigators knocked on the door, announced themselves as being special investigators, Federal officers, with a search warrant.

At this time the defendant said, "Be still, be quiet," and he ran into the back part of the house.

I immediately ran to the front door, opened the front door and admitted the other special investigators.

MR. FITZPATRICK: May this be marked Government's Exhibit 5 for identification.

(Government's Exhibit 5 marked for identification.)

Q. Mr. Jordan, directing your attention to Government's Exhibit 5 for identification, do you recognize that?

A. Yes, I do. I recognize it because it is a sawed-off shotgun, the butt is sawed off, the barrel is sawed off. At the time it was seized Special Investigator Patty again put his initial in the—on the trigger housing.

Q. Was that done in your presence?

A. It was done in my presence. We unloaded the weapon. There was a round in the chamber. Investigator Patty and I unloaded it.

Q. Is that the weapon you saw on the night table?

A. This is the weapon.

MR. FITZPATRICK: I offer it.

MR. KESSLER: I have no objection, your Honor.

(Government's Exhibit 5 for identification received in evidence.)

MR. FITZPATRICK: I have no further questions, your Honor.

## CROSS EXAMINATION

By MR. KESSLER:

Q. Mr. Jordan—I am sorry—Special Investigator Jordan——

A. "Mister" is fine.

Q. Very good.

On the 28th you received nothing from Mr. Bass, is that not correct, the first day you went?

A. No, I only talked with him. I went down to the basement.

Q. And he gave you nothing and you gave him nothing?

A. That is correct.

Q. When you did talk to him you told him that you needed narcotics, is that correct?

A. That is correct.

Q. And on the 29th you came back and you again told him that you needed narcotics?

A. That is correct.

Q. How long have you been agent?

A. Over ten years.

Q. And have you been dealing with narcotics violations for any part of that period?

A. Not directly that much. Occasionally we do.

Q. About how often?

A. It is difficult to say. Whenever it comes up incident to an investigation.

Q. Well, do you have any knowledge of the use of narcotics through your work?

A. If you mean have I had any special training in the use of narcotics, yes, I have, because all Treasury agents are instructed at the Treasury school in Washington.

Q. These bags that you purchased, these are what we call \$2 bags, is that correct?

A. They are called bags. The price varies. In Brooklyn a bag like that might cost you \$3.

Q. They are bigger bags, though, aren't they? These are the smallest quantity sold, isn't that correct?

A. They have different prices for the same size bag.

Q. But this is the smallest quantity sold, is that correct, this unit called a bag?

A. Yes. The term "bag" is almost generic, and I think it is loosely termed. They have different street language, colloquial language which you might use for it. But generally speaking that would be the smallest quantity to purchase.

Q. Thank you.

Now, someone who is addicted to heroin would use quite a bit more than one of these bags at a time when he used his narcotics, is that correct?

A. I am hesitating on the word "addiction."

Q. Let me rephrase the question and be a little more specific.

Somebody who had used narcotics, specifically this narcotic, heroin, sufficiently long for his body to build up a tolerance could and perhaps would have to use as many as eight or ten of these little bags at one time to reach the desired effect?

A. That would be a little heavy. I think the average is around five or six bags a day.

Q. Five or six is about the average, you would say, as far as you know?

A. To the best of my knowledge. I might say this, too:

The potent of heroin, that is, how strong it is, would vary. If the mixture is weak, the person might require more bags per day, or if it is sufficiently strong, one dose could be an overdose.

Q. And of course, also, when I mention each time, someone who is addicted might use this quantity more than once in a day, is that correct?

A. Yes, I would agree with you.

Q. When you came to—let me withdraw that. Where is this house, where was it?

A. On Fairmount Place, in the Bronx, at 804.

Q. And what sort of a neighborhood is that?

A. I would consider it a ghetto, a depressed area; somebody else may consider it otherwise.

Q. Well, what is the area of the Bronx that it would be in? What is the neighborhood called?

A. I don't know any specific neighborhood by name.

Q. Mr. Bass told you that he had the weapons to protect himself from robberies?

A. Yes, he did.

Q. Have you ever done any investigative work in that area?

A. In that particular area?

Q. Well, yes, that neighborhood.

A. Yes, I have.

Q. Are robberies common there?

A. I would say that there is a great likelihood that they might be. I don't know of any specific robberies.

Q. Does this work, by the way, this gun?

MR. FITZPATRICK: I object, your Honor, unless the witness knows it as a fact.

MR. KESSLER: Of course.

THE COURT: If he doesn't know, he would say he doesn't know.

Overruled.

A. I honestly don't really know.

Q. Well, do you know whether any tests were performed upon this weapon?

A. The weapon was not fired with a shell. We examined it, we gave it what we call an operations test.

Q. And you did this personally?

A. In conjunction with a Customs agent that operates the range.

Q. Did it have a firing pin?

A. It has a firing pin but the firing pin may be defective.

Q. When you came to purchase narcotics on the 29th, you came with this radio, which was placed into evidence is Government's Exhibit 3?

A. That is correct.

Q. Then at that time you told Mr. Bass that you needed narcotics but didn't have money?

A. That is correct.

Q. Were you playing any particular role at this time?

A. I was continuing my undercover role.

Q. Were you attempting to appear like a typical narcotic addict who would be coming to purchase drugs?

A. No, I was not.

Q. Well, you purchased, I believe, seven bags for this radio, is that correct?

A. Right.

MR. KESSLER: May I have a moment, your Honor?

THE COURT: Yes.

Q. On the 30th you had a search warrant, is that correct?

A. That is correct.

Q. Was a search made?

A. Yes, a search was made.

Q. Was a search made for narcotics at that time?

A. No; our search was not for narcotics at the time.

Q. You mean you did not look for any narcotics?

A. No, I don't mean that. I mean that——

Q. Did you look for narcotics or didn't you?

A. In the course of searching for what we were searching for, we did keep our eyes open for narcotics. That is the best way I can answer that question.

Q. Did you find any?

A. No, we didn't find any narcotics per se.

Q. You mean you found no narcotic substance? Well, I will withdraw that.

Did you find any heroin?

A. I am debating——

Could I speak to you both before I answer that question, because I don't want to say anything prejudicial, and I don't——

MR. FITZPATRICK: May we have a side bar, your Honor?

(To the jury) I don't decide the fact, you do, so if there are any things that shouldn't come into evidence and I hear them, it won't affect me; but it might theoretically affect you, and that is why, not wishing to be discourteous, we go over into private like this.

(The following took place at side bar out of the hearing of the jury.)

MR. FITZPATRICK: Your Honor, what Mr. Jordan was going to testify to is the fact that they found narcotic apparatus on the premises, and as long as Mr.——

THE COURT: No, I think he just answer the question. If you want it, you are entitled to bring that out on redirect.

MR. FITZPATRICK: I do intend to.

MR. KESSLER: My question was——

THE COURT: I will allow it on redirect, though. I think we ought to take care of the whole business.

MR. KESSLER: As long as he just answers my question now.

THE COURT: All right.

(Side bar conference ended and the following took place in the hearing of the jury.)

THE COURT: I think the question at this time, Mr. Jordan, is strictly: Did you find any narcotics? And whatever might conceivably happen some other place or time, answer only that question yes or no.

THE WITNESS: I think the best answer, your Honor, is I don't know, and there is a reason——

THE COURT: You don't know.

THE WITNESS: Right.

THE COURT: Do you want to pursue it, Mr. Kessler?

Q. Well, did you find the plastic white powdery substance? Yes or no.

A. A small quantity, I would have to put it that way.

Q. You mean a quantity in the amount that you had purchased before, or smaller?

A. Smaller than that.

MR. KESSLER: No further questions.

MR. FITZPATRICK: Just a couple, your Honor.

#### REDIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Jordan, did you find anything that might be classified as narcotics apparatus during your search of the premises?

A. Yes, we did.

Q. What did you find?

A. We found a strainer; we found quantities of narcotics broken down and sold to distributors, and they are sold usually in quantities and they are wrapped in finfoil. And we found the tinfoil—this is why I say I couldn't be sure—because in the tinfoil there was the powder, but it was too small to take to the lab. We found that. We found spoons and other devices that they use in cutting the narcotics and weighing it out.

MR. FITZPATRICK: Your Honor, at this time, if I may, I

would like to open Government's Exhibit 2 for identification, which is a sealed envelope.

I am opening—

THE COURT: Mr. Kessler looks—

MR. KESSLER: Yes, I didn't have anything to do with Government's Exhibit 2, as far as I know, on my cross-examination.

THE COURT: No. Is there any other objection?

MR. KESSLER: None, your Honor.

THE COURT: I will let him do it. If you want further cross, I will allow that.

MR. FITZPATRICK: Thank you, your Honor.

I am opening it by breaking the original seal on the envelope.

May these be marked Government's Exhibit 6 for identification.

(Government's Exhibit 6 marked for identification.)

Q. Mr. Jordan, directing your attention to Government's Exhibit 6 for identification, do you recognize those items?

A. Yes, sir, I do.

A. How many are there?

A. There are seven bags.

Q. Are those the bags that you received from Mr. Bass on July 29th, 1969?

A. Yes, they are.

Q. And they are the ones that you placed into Government's Exhibit 2 and then sealed, is that correct?

A. That is correct.

MR. FITZPATRICK: I have no further questions, your Honor.

#### RECROSS EXAMINATION

By MR. KESSLER:

Q. Mr. Jordan, in using this narcotic, if you wish to inject it, one way of doing that is to empty it into a spoon with some liquid and heat it up and then put it in a syringe, is that correct?

A. That is what I have been told.

Q. And that is what spoons are used for, and one purpose—I will withdraw that.

That is one purpose of using the spoon, is that correct?

A. That is one purpose, yes.

Q. And the narcotics, which you say at times is wrapped in tinfoil, was that it?

A. Yes.

Q. Tinfoil?

A. The same kind of tinfoil you might wrap a piece—

Q. That is the same kind of narcotics that we have here in a somewhat great economy, is that correct?

A. Yes. The best way to answer that is yes.

MR. KESSLER: Thank you.

THE COURT: Anything else from Mr. Nordan, gentlemen?

MR. FITZPATRICK: I have nothing further, your Honor.

MR. KESSLER: No, your Honor.

THE COURT: All right, Mr. Jordan.

(Witness excused.)

MR. FITZPATRICK: The Government's next witness is Robert Patty.

ROBERT PATTY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Patty, how are you employed?

A. I am a special investigator, United States Treasury Department, assigned to the Alcohol, Tobacco & Firearms Division.

Q. How long have you been so employed?

A. 15 years.

Q. Directing your attention to July 30th, 1969, were you working that day?

A. I was.

Q. Directing your attention to the evening of that day, would you tell the members of the jury what you were doing?

A. Yes. I was with several members of my squad up on—was it 804?—I can't quite remember the address; we had an arrest warrant and search warrant I believe for premises. I took part in the activities to execute a warrant.

Q. Do you know the street on which the premises were located?

A. I just can't remember the name now. I am sorry, I don't have my notes with me, Counselor. I can't remember it.

Q. Mr. Patty, would it refresh your recollection if you were told that the address was 804 Fairmount Place?

A. That is correct.

Q. Approximately what time did you go there?

A. It was in the evening, early evening.

Q. Do you remember the approximate time?

A. Some time around 6.30, in there somewhere.

Q. Did you enter the premises at 804 Fairmount Place?

A. Along with several others of the group, I did, yes.

Q. How did you obtain entrance?

A. Well, I wasn't the first one in; I was the fourth or fifth one that went in. They knocked—

Q. Were you with the group that did enter?

A. Yes, I was with the group that entered, but I wasn't right at the door.

Q. How did they obtain entrance?

A. They knocked on the door, and the door was opened, I don't know by who.

Q. What did you do when you entered the premises?

A. I walked—there was a living room that I went into and my group walked through into a bedroom, and my area supervisor told me to look around for any weapons, which I proceeded to do.

Q. Did you find any weapons?

A. Yes. Right alongside the bed, on the night table, there was a sawed-off shotgun, which I took.

Q. Directing your attention to Government's Exhibit 5 in evidence, is that the shotgun you are referring to?

A. It is.

Q. How do you recognize it?

A. I have my mark scratched in here, in the middle.

Q. Did you continue your search for weapons?

A. I did.

Q. Did you find any others?

A. Yes. Under the bathtub in the bathroom I found a Baretta.

Q. Directing your attention to Government's Exhibit 4 in evidence, is that the weapon you found under the bathtub?

A. It is; it has my mark.

Q. Was the weapon loaded at the time?

A. Yes; they both were loaded.

Q. Did you seize anything else while you were on the premises?

A. Yes. I removed a clock radio, which was plugged in in the bedroom.

Q. Directing your attention to Government's Exhibit 3 in evidence, would you tell us whether that is the radio?

A. Yes, that is the radio. It has my scratch on here.

Q. Mr. Patty, directing your attention to the following day, July 31, 1969, were you present when the defendant was interviewed by me?

A. I was.

Q. At the time of that interview was the defendant warned of his rights?

A. He was.

Q. Would you tell the members of the jury what rights specifically he was warned of?

A. He was told that he didn't have to make any statements, that he could have an attorney present, but that if he did answer any questions he could stop at any time he felt he wanted to, he could have counsel, and if he couldn't afford counsel one would be given to him.

Q. Was he told that anything he said could be used against him in a court of law?

A. That is correct, he was.

Q. After those warnings did the defendant make any statement concerning the facts of this case?

A. I recall he was asked about the——

THE COURT: Just say yes or no.

A. Yes, he did.

Q. What did he say?

A. He was asked about narcotics and——

THE COURT: Is this all acceptable, Mr. Kessler?

MR. KESSLER: Well, your Honor, I have no objection to what he said but not what he was asked.

THE COURT: Why don't you say what he said? Can you say it without saying what he was asked?

THE WITNESS: Yes. He said he knew nothing about narcotics but admitted that the two guns that I had taken in the apartment were his. He stated that he had purchased them a few weeks before from some unknown person on the street who was selling them, and that he had purchased them for his own protection; that he had been robbed, I don't recall if he said once or twice, in his apartment, and he wanted to be protected, and he bought these guns.

Q. Did he say anything else?

A. Yes. He said that he had been convicted——

Q. No.

MR. KESSLER: Sorry.

Your Honor, I move to strike that out.

THE COURT: All right.

MR. FITZPATRICK: May this be marked Government's Exhibit 7 for identification.

(Government's Exhibit 7 marked for identification.)

MR. FITZPATRICK: I offer this, your Honor.

MR. KESSLER: Your Honor, we will stipulate that Mr. Bass has been convicted of a felony.

THE COURT: Let's be more precise. What is it you are stipulating?

MR. KESSLER: That on July 20th, 1967, Mr. Bass, the defendant here, was charged with a crime, and that on January 3rd, 1968 he was—well, he pleaded guilty, and that that crime was a felony.

MR. FITZPATRICK: And it is the felony, your Honor, that is charged in the indictment in Counts 1 and 2 as a felony for which he had previously been convicted.

THE COURT: Is that correct, Mr. Kessler?

MR. KESSLER: I can't say whether it is the felony, but since it is a felony it would certainly suffice.

THE COURT: Well, is it stipulated that for our purposes the jury may consider it as being the felony?

MR. KESSLER: Yes, certainly.

THE COURT: All right. Then as I understand the stipulation there is no dispute that on or about the 1st day of February 1968 the defendant was convicted by the New

York Supreme Court, Bronx County, of the felony charged in Paragraph 1 of Count 1 and Count 2 of the indictment herein; is that right?

MR. KESSLER: That is correct.

THE COURT: Okay.

MR. FITZPATRICK: Your Honor, I believe we have cleared up any possible problem on the stipulation as to whether or not it was the same crime, is that correct?

MR. KESSLER: Okay.

MR. FITZPATRICK: I have no further questions, your Honor.

#### CROSS EXAMINATION

By MR. KESSLER:

Q. Mr. Patty, on the 31st was the defendant told that the purpose of his interview was to gain or to supply information which could be used by the Assistant United States Attorney in making an informed proposal as to what bails should be set when this matter appeared before the Commissioner?

A. I don't recall that specifically, Counsel.

Q. Well, was something to that effect told him?

A. Something like that.

Q. When you entered the house of Mr. Bass and you entered his bed room, in that room Government's Exhibit 3, which is the radio, was located, is that correct?

A. Was located?

Q. Yes. It was in his bedroom?

A. Yes.

Q. And it was plugged in?

A. That is correct.

Q. And where was it in the bedroom?

A. On the, when you face the bed, it was on the right wall. There was some kind of a dresser, I didn't pay too much attention, but it was standing on there.

Q. Was it on or not?

A. Was it on?

Q. Yes.

A. Not when I came in.

Q. Were there any other radios in the bedroom?

A. I didn't notice.

MR. KESSLER: I have no further questions, your Honor.

MR. FITZPATRICK: I have no further questions, your Honor.

THE COURT: All right, then, Mr. Patty. It is well timed; I think we ought to take the luncheon recess.

The cuisine in this neighborhood is not splendid and it takes time sometimes to eat, and there are a couple of small things that need to be done; so we will take a slightly extended lunch recess and plan to resume at 2.20.

(Recess to 2.20 p.m.)

#### AFTERNOON SESSION

(2.20 p.m.)

THE COURT: Get the jury in.  
(Jury present.)

KENNETH CONIGLIO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Coniglio, how are you employed?

A. I am a special investigator with the Alcohol, Tobacco & Firearms Division of the United States Treasury Department.

Q. How long have you been so employed?

A. Approximately a year and a half.

Q. On July 30th, 1969 were you on duty?

A. Yes, sir.

Q. Were you on duty that evening?

A. That is correct.

Q. What did you do at that time; do you recall?

A. At approximately 7.55 p.m. I proceeded to the rear of a building, 804 Fairmount Place, Bronx, New York, and stationed myself in the backyard for instructions from my area supervisor.

Q. And what happened?

A. We were there pursuant to an arrest warrant. A few seconds after I stationed myself in the rear of the backyard a man now known to me as Denneth Bass exited the

rear door; at which time I announced myself as a Federal officer and placed him under arrest.

Q. Do you recognize that man in the courtroom today?

A. Yes, sir, I do.

Q. Would you point him out?

A. He is the defendant sitting at the table over there.

Q. Sitting next to his attorney?

A. Next to the attorney, yes, sir.

MR. FITZPATRICK: May the record reflect that he properly identified the defendant.

Q. When you went there did you go to effect an arrest of any particular person?

A. Yes, sir.

Q. How was that person known to you at this time?

A. Dennis.

MR. FITZPATRICK: I have no further questions, your Honor.

MR. KESSLER: I have no questions.

THE COURT: All right.

(Witness excused.)

MR. FITZPATRICK: The Government's next witness is Stephen Liebowitz.

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STEPHEN LIEBOWITZ, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Liebowitz, how are you employed?

A. I am a special investigator for the United States Treasury, Alcohol, Tobacco & Firearms Division.

Q. How long have you been so employed?

A. Six months.

Q. Do you recognize the defendant Denneth Bass?

A. Yes.

Q. Would you point him out, just indicating who he is?

A. The gentleman at the back table with the red and black striped tie.

MR. FITZPATRICK: May the record reflect that the witness has identified the defendant properly.

Q. Mr. Liebowitz, were you present in my office on December 22, 1969 when I had a conversation with this defendant?

A. I was.

Q. At the time was the defendant warped of his rights?

A. Yes, he was.

MR. KESSLER: Your Honor, I will object to any statement on this day.

May we approach the bench?

THE COURT: Yes.

(The following took place at side bar out of the hearing of the jury.)

MR. KESSLER: Your Honor, this statement was elicited after Mr. Bass had been arrested, after he had been provided with counsel in July. He was rearrested in December. Counsel was not notified. I believe he had been invited. Counsel was not notified of the indictment. And there was some other inquiry. The alleged reason for this sort of inquiry by the United States Attorney is to give him information upon which he can base a request for a bail application. Certainly all the information was known to him from the first interview and going into the facts of the crime, the initial crime for which an arrest and interview had already been taken.

THE COURT: Is this after you had originally be retained?

MR. KESSLER: Yes.

THE COURT: Mr. Fitzpatrick.

MR. FITZPATRICK: Your Honor, first of all, on the question of his bail status, it was very much changed.

THE COURT: I don't care about that. You took care of the bail thing. Why should I receive the evidence?

MR. FITZPATRICK: Because at the time the defendant was fully warned of his rights, he had a right to an attorney—

THE COURT: I will receive it. It is excluded.

MR. FITZPATRICK: Very well.

(Side bar conference ended and the following took place in the hearing of the jury.)

THE COURT: For the information of the jury, I sustain the objection to this information.

MR. FITZPATRICK: I have no further questions, your Honor.

MR. KESSLER: No questions, your Honor.

THE COURT: All right, Mr. Liebowitz.

(Witness excused.)

MR. FITZPATRICK: Your Honor, the Government's next witness is Roger Canaff.

\* \* \* \* \* (Witness excused.)

MR. FITZPATRICK: The Government rests, your Honor.

THE COURT: Mr. Kessler, do you want me to give the jury a short recess at this point?

MR. KESSLER: Yes, your Honor.

THE COURT: I will do that.

We have a little legal business which will take about ten minutes.

(Jurors left the courtroom and the following took Place in their absence.)

THE COURT: Mr. Kessler.

MR. KESSLER: Your Honor, I would first move to dismiss on the ground that the Government's case is insufficient as a matter of law.

I would also move to dismiss Counts 1 and 2 on the basis that, there being no proof of any transportation of these weapons in any form in affecting or in any way around commerce, and this statute, as far as I have been able to discover, deriving from under the commerce laws, that this would be an excessive act by Congress, not within the proper scope, and that it is a matter properly to be left to the states, and that an essential element of proof of conviction would have to be some interstate element. That is as to Counts 1 and 2.

As to Count 3 I would just the motion to dismiss as to the insufficiency of the Government's case.

THE COURT: There is no allegation in the indictment of any movement in or affecting commerce; is that right, Mr. Fitzpatrick?

MR. FITZPATRICK: That is right, your Honor.

THE COURT: You don't claim that the evidence shows any such movement?

MR. FITZPATRICK: No, your Honor.

THE COURT: And am I correct in understanding that there was no motion addressed to the indictment on this ground?

MR. FITZPATRICK: That is correct, your Honor.

MR. KESSLER: There were no motions at all, your Honor.

THE COURT: Well, both motions are denied without prejudice to renewal, even if I could prejudice renewal, at least on the constitutional claim and anything else, if and when there may be a conviction.

Now are you going to put on any evidence, Mr. Kessler?

MR. KESSLER: I was going to ask for a brief recess, your Honor, perhaps five or ten minutes, to clarify that point.

THE COURT: Well, let us make it closer to five, because I think we have known where we stood. We will give you an extra minute or two if you need it. Let us know as soon as you are ready.

MR. KESSLER: Thank you, your Honor.

(Recess.)

(The following took place in open court in the absence of the jury.)

THE COURT: I was waiting to be informed. Is the defendant going to put on evidence?

MR. KESSLER: Yes, your Honor.

(Jury present.)

MR. KESSLER: Your Honor; at this time the defense calls Denneth Bass.

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DENNETH BASS, the defendant, called as a witness on his own behalf, being first duly sworn, testified as follows:

MR. KESSLER: May I inquire, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

By MR. KESSLER:

Q. Mr. Bass, how old are you?

A. I am 25 years old.

Q. Mr. Bass, you have to speak up so I can hear you back here and so all the people in the jury box can hear you. Okay?

A. Yes.

- Q. A little bit louder?
- A. Yes.
- Q. Now, where do you live?
- A. I live at 829 East 167th Street in the Bronx.
- Q. Do you remember in July, the 31st of July when you were arrested, do you remember that day?
- A. Yes.
- Q. Where did you live then?
- A. I lived at 804 Fairmount Place in the Bronx.
- Q. At that time, Mr. Bass, did you use narcotics?
- A. Yes.
- Q. Did you take them by injection?
- A. No, I didn't.
- Q. How would you use them?
- A. Sniffing. Sniff.
- Q. What did you sniff?
- A. Two or three bags at a time.
- Q. On the 30th, I'm sorry, on the 29th of July of 1969 did you have seven glassine envelopes?
- A. Yes, I did.
- Q. You did?
- A. Yes.
- Q. The day before that, that is the 28th, did a man who you saw testify today come to you?
- A. Yes, he did.
- Q. Did you have a conversation with him?
- A. Yes.
- Q. What did you tell him and what did he tell you?
- A. He told me that he was looking for some drugs. And I told him, in other words, the person that lived in the basement, they were selling drugs. So I told him to go to the basement.
- Q. Were you selling drugs?
- A. No. No, I wasn't.
- Q. Did he have any further discussion with you at that time?
- A. No, he didn't.
- Q. Did you see him again the next day?
- A. Yes, I did.
- Q. Did you have a discussion with him then?
- A. Yes, I did.

Q. Did he again tell you that he needed drugs?

A. Well, after we got into a conversation, he did.

Q. Well, speaking up, tell us what that conversation was.

A. He came: I think it was about two o'clock in the evening he came, and he had a radio with him, and he was telling me that he needed the drug. I had seven bags, this was for my own personal use, understand. But, understand, for the radio I figured that I could get the radio and then get some more for my personal use.

Q. What did you do with the radio?

A. I took the radio and tested it out, and then I put it in my bedroom.

Q. Did you use it?

A. Yes, I did.

Q. At that time did you have any discussion with the person you now know to be Mr. Jordan about robberies?

A. No, I didn't. No.

Q. Have you ever been burglarized?

A. Yes, I have.

Q. Do you remember what if anything was stolen those times—that time?

A. Well, I had been robbed a couple of times.

Q. What sort of things were stolen from you?

A. Like a TV on one occasion. Another occasion a record player. On another occasion a radio.

Q. Were you ever personally assaulted or attacked during these robberies?

A. Yes, I was.

Q. How long prior to July 30th were those robberies?

A. About a month before. And about a week afterwards, after I had, after I was released and went back home it happened again.

MR. KESSLER: May I have a moment, your Honor?

THE COURT: Yes.

Q. In the neighborhood in the Bronx where you lived on July 30th, 1969, are there many addicts?

A. Yes, there are.

Q. Did you ever see any of these addicts in withdrawal?

A. Withdrawal—clarify that.

Q. I can't hear you.

A. Clarify that for me, withdrawal.

Q. I will try to use a shorter word if I can.

Have you ever seen any of these addicts when they are not able to obtain the narcotics that they need and are still addicted?

A. Yes, I have.

Q. Would you describe how they act at those times?

MR. FITZPATRICK: I object, your Honor. There doesn't appear to be any relevance to this question at all.

MR. KESSLER: Your Honor, the testimony we have from Mr. Jordan is that he told the defendant that he needed these narcotics, and I wish to bring out exactly what this witness thought he meant by that.

MR. FITZPATRICK: He also testified that he wasn't—

THE COURT: Does it matter what he thought? I am not sure yet of the relevance of it.

MR. KESSLER: I think, your Honor, that it does matter as to the state of mind of this defendant at the time that this transaction occurred.

THE COURT: Do you have to be more specific? Do you want to come to the bench?

MR. KESSLER: Yes, your Honor.

THE COURT: (To the jury) Excuse us, please.

(The following took place at the side bar out of the hearing of the jury.)

MR. KESSLER: Your Honor, I believe that the closest I can come to describing what Mr. Bass is saying is that he believes that he was in effect seduced, though I am not trying to call it entrapment, but that he was persuaded to transfer seven bags of narcotics to the agent because he thought that the agent was sick—he didn't use the word "withdrawal," I did—and that this would, well, help him.

THE COURT: I am sorry you went through that whole interrogation. I think you should first have gotten him to describe what the agent looked like when he sold it to him.

MR. KESSLER: I will do that.

THE COURT: Is that what you are up to now?

MR. KESSLER: Yes.

THE COURT: I am very doubtful that you are going to be hurt by it, Mr. Fitzpatrick.

MR. FITZPATRICK: Very well. To avoid another side bar on cross-examination, I am going to bring out, try to bring out his conviction and what that conviction was for, and if there is going to be objection, I would like—

MR. KESSLER: There will be no objection.

MR. FITZPATRICK: Fine.

MR. KESSLER: As to what the conviction was for. We have here an arrest for a different charge. I assume Mr. Fitzpatrick is not going to go into what the charge was on the arrest.

MR. FITZPATRICK: His conviction was pleading to a lesser charge.

(Side bar conference ended and the following took Place in the hearing of the jury.)

By MR. KESSLER:

Q. Mr. Bass, would you describe to us what Mr. Jordan looked like when he came to your door on the 30th of July?

A. Well, he was, he had ordinary dress.

Q. I can't hear you.

A. He had ordinary dress, you know, sport pants and a shirt, you know, a colored shirt, and he looked like he was sick to me.

Q. That is what I would like to find out. Would you describe how he looked and what is the basis for that opinion of yours?

A. Well, to me, he looked, you know, like as if he had just, what I thought of him, well, I thought maybe he had just stole the radio from somebody or something and brought it to me and was trying to get something to get straight.

Q. I want to restate the question again. What was his face like? Did he have any mannerisms? Describe what he did or how he looked such that you thought he was sick.

A. Well, to me he was desperate. He wanted me to—in other words, he could have got more for the radio. But the way he was, he would sell for less. So that's why I thought he was desperate, like he needed it bad because he was letting it go cheap, so to speak.

Q. Now, Mr. Jordan returned on the 30th, that was the next day; is that correct?

A. That was the day of the arrest?

Q. That is right?

A. Yes.

Q. And on that day did you have any narcotics in your possession?

A. No, I didn't. No, I didn't have none.

MR. KESSLER: I have no further questions, your Honor.

#### CROSS EXAMINATION

By MR. FITZPATRICK:

Q. Mr. Bass, when Mr. Jordan came to your door on July 29th with this radio, you said that he looked sick, and your attorney asked you to describe just how he looked sick, and you said, well, he looked as if he had just stolen this radio and he looked desperate.

Was there anything about his physical mannerisms that suggested to you he was sick or desperate?

A. It was mostly his conversation is what convinced me.

Q. It was mostly his conversation that suggested to you he was sick?

A. Yes.

Q. Did his eyes look strange at all?

A. It's hard to tell when a person is sick, it's hard to tell; because he looks pretty normal like any other person.

Q. Then he looked normal?

A. Unless he is sick to the point that he can't walk, or something like that.

Q. So there was nothing special about him that made him look sick to you?

A. Well, to me, he just had the look of a person that used the drugs and the habit, you know, the drug was wearing down and they was trying, they need to get a fix.

Q. Did his eyes look strange at all?

A. Well, they looked like of watery.

Q. Was he nodding or weaving in any way?

A. Well, he was sick. No, he didn't. When a person is sick—

Q. Pardon?

A. (Continuing)—they don't be noddin'g.

Q. When they are sick they don't nod?

A. No. The nod is after they got the drug and they are high then and then they be noddin'g.

Q. You saw Mr. Jordan in court today, did you not?

A. Yes, I did.

Q. And he looked fairly healthy, a fairly chunky individual, you might say, would you not?

A. Yes.

Q. Is that approximately what he looked like last July 29th and 28th when you met him?

A. Prior to the time that he made the arrest he didn't look as if he used the drug or anything.

Q. But the following day he did?

A. Yes; you know, he came in, he was, you know, like he was tired, you know, he was tired, you know, but not when he came in for the arrest. Then his appearance altogether changed, like he was wide awake, alert.

Q. And you suggesting then that you sold him your own personal supply because you felt sorry for him in this situation?

A. Yes; and also because of the radio.

Q. How many bags did you have in your home that day?

A. I had about nine.

Q. And you gave him seven for the radio, is that right?

A. Yes.

Q. Did you buy the drug from the people downstairs?

A. Yes, I did.

Q. But you never sold any other than this one occasion?

A. No, I didn't.

Q. But you were aware that they were selling it downstairs?

A. Yes, I was.

Q. Had people come to you before and asked whether drugs were being sold on the premises?

A. On a couple of occasions. If they got like—they knew the building, but they—the right door, like they didn't know whether it was upstairs or downstairs. If they knew the building. Sometimes they got mixed up and they would come upstairs and I would tell them it wasn't here, something like that.

Could I state something else?

Q. Certainly.

A. Like this selling that was going on from the basement, like, it brought a lot of people that were trying, you know, to get in the house, you know, trying to get down to rob, you know, rob, you know, take the people off for their drug that they were selling, so this constituted a threat to me, so I got me some protection to protect myself and my wife, as far as this was going on.

Q. You owned that building, is that right?

A. Yes, I did.

Q. And there were tenants?

A. Yes.

Q. I ask you to take a look at Government's Exhibit 4 and Government's Exhibit 5. Do you recognize them?

A. Yes, I do.

Q. Are they your weapons?

A. Yes.

Q. Mr. Patty testified that he found this in your bedroom on the evening of the 30th; is that correct?

A. Yes.

Q. Is that where it was?

A. Yes.

Q. And he found this under a bathtub in the bathroom; is that where you stored that?

A. Yes.

Q. When Mr. Jordan came to the door on the 29th with the radio, did you have that pistol in your possession?

A. Yes.

Q. When you were initially arrested on July 31, 1969, do you recall saying that you never carried those guns, when you answered the door?

A. Yes, I did.

Q. And that answer then was not true, is that right?

A. Yes.

Q. Do you also recall telling me that you never sold narcotics?

A. Yes.

Q. And is that answer untrue?

A. Well, I made the sale on this occasion, so that was not true.

Q. That's the only occasion you have ever sold narcotics, is that right?

A. Yes.

Q. I ask you to look at Government's Exhibit 6, the seven glassine envelopes. Do you recognize them?

A. Yes, I do.

Q. Are those the glassine envelopes that you sold to Mr. Jordan?

A. Yes.

Q. You heard Mr. Jordan testify that he found certain apparatus in your apartment, strainers and spoons and tinfoil packages with white powder; is that correct?

A. Yes.

Q. And is that true, was that apparatus in your apartment?

A. Well, the strainer could be used in the kitchen, measuring spoons could be used in the kitchen.

Q. Were these items used in the kitchen or were they used to dilute heroin?

A. They were used for the kitchen, you know, in the kitchen, for preparing food.

Q. In this particular case then they were not used in preparing heroin in any way, is that correct?

A. No.

Q. What were the tinfoil packages with white powder in them, what were they?

A. It was bonnita.

Q. What is that?

A. That is a cutting element used in preparing drugs.

Q. What were you doing with that?

A. It can also be used as a—

Q. I am not asking what it could be used for. I am asking what you were using it for?

A. Well, I wasn't using it. I was just holding it, I was just holding it for someone.

Q. For whom? The people downstairs?

A. Yes.

Q. Why were you holding it?

A. Well, to me, the bonnita it was no drug or anything, so I didn't see that I could get into trouble with it. In

other words, the drug itself is what constitute trouble. But the cut was just minor things that go along with it.

Q. Why would you want it? What reason would there be for you to have this bonnita in your apartment?

A. I was just holding on to it.

Q. Why?

A. Well, I had a sniffing habit, so by holding on to this they would, you know, give me a few bags every now and then. So I held on to it.

Q. You mean you were holding it as ransom, so to speak, to make sure they kept giving you two bags whenever you needed it?

A. No, it was theirs.

Q. You agreed to hold on to it?

A. Yes.

Q. Once again I ask you for what reason, why didn't they just keep it downstairs in their own apartment?

A. This I don't know.

Q. They just asked you to keep these envelopes up there, is that right?

A. Yes.

Q. But the strainers and the spoons, they did not belong to the people downstairs, is that right?

A. No.

Q. You used them in your kitchen?

A. They belong to me.

MR. FITZPATRICK: I have no further questions, your Honor.

#### REDIRECT EXAMINATION

By MR. KESSLER:

Q. Mr. Bass, are we talking about one strainer or a lot of strainers?

A. One strainer.

Q. When we talk about measuring spoons, how many of them are we talking about?

A. One set, which consists of about four spoons.

Q. You mean the kind you buy in Woolworth's?

A. Yes, on a ring.

Q. Are you married, Mr. Bass?

A. Yes, I am.

Q. Mr. Bass, you were asked whether people often came to your door asking where they could buy heroin.

A. Well—

Q. I haven't asked the question yet. Hold on.

Now in that neighborhood where you lived in July, how many people do you know there who use drugs?

A. Personally?

Q. Personally. Not limited to those who are addicted to it, but those who use it.

A. Just the people downstairs.

Q. No, not who sold it. Who used it?

A. I don't know any personally.

Q. Well, you use narcotics, don't you?

A. I have never, like, hung out with the crowd that did. In other words, this was something I was just starting.

MR. KESSLER: I have no further questions.

MR. FITZPATRICK: Just one, your Honor.

#### RECROSS EXAMINATION

By Mr. FITZPATRICK:

Q. Mr. Bass, you had previously been convicted of a crime, is that right?

A. Yes, sir.

MR. FITZPATRICK: I have no further questions, your Honor.

THE COURT: Anything else, Mr. Kessler?

MR. KESSLER: Nothing, your Honor. The defense rests.

THE COURT: All right, Mr. Bass.

(The witness left the stand.)

THE COURT: Did you say the defense rests?

MR. KESSLER: That is correct, your Honor.

THE COURT: Will you have anything else at this time, Mr. Fitzpatrick?

MR. FITZPATRICK: No, your Honor.

\* \* \* \* \*

#### CHARGE OF THE COURT

THE COURT: Miss White, ladies and gentlemen of the jury:

This has been a brief trial. You have heard the evidence.

You have heard the able arguments of these young lawyers urging their opposed views for their clients as to what they think you the jury should find from the evidence.

As we have all told you, it is my task now to instruct you on the law, the law as it comes to me from the authority of Congress and higher courts, not law that I create or select for myself. It is my duty to give you the law as it is entrusted to me to convey to you, and of course it is your duty as jurors to follow those instructions. None of us is entitled here, if this procedure is to be effective and to do justice, to follow his own private views on the rules of law we enforce in our criminal proceedings.

Your critical task now, applying the few rules about which I will tell you, is to seek to determine the truth and a verdict based upon your judgment as to the truth.

You are the sole judges of the facts. We have told you before that the things said by counsel and the things said by the judge are not evidence. The evidence is the testimony you have heard and the exhibits we have received, and those are the materials from which you are to determine the truth, if you can.

I remind you, too, although I think it is unnecessary, that discussion between Court and counsel, rulings by the Court, none of those things are evidence, none of them should divert you from your attention to the evidence and the inferences you find you should draw from it.

You know now, as you probably did before, that the charge in this case, as in most criminal cases, is laid in an indictment. There are three charges in that indictment, as you know, and in a minute or two I will read the indictment to you. But let me stress once more that the indictment is no more than an accusation. Let me remind you that it is not in itself evidence of any kind. It is no indication of guilt. It is merely a statement of the charges for the guidance of the defendant and the jury in the course of this criminal trial.

The defendant has responded to that indictment by pleading not guilty. That places on the Government the burden of proving his guilt, if he is to be found guilty, beyond a reasonable doubt. It is a burden that never shifts; it remains with the Government throughout the trial.

The question whether that burden has been met, the ultimate question for you, does not depend on the number of witnesses or the quantity of testimony but on the nature and the quality of that testimony and all the evidence in your good collective judgment.

I have told you that as a corollary of the Government's burden of proof beyond a reasonable doubt it is the law with us that a defendant is presumed to be innocent of charges stated against him. That presumption stays with him throughout and would be in his service when you go to the jury room to deliberate. The presumption alone is sufficient to acquit unless you, the jury, are unanimously persuaded by the evidence beyond a reasonable doubt of his guilt.

Now because the notion of proof beyond a reasonable doubt is essential with us, it is necessary to attempt some definition of that concept. When we speak in our law of a reasonable doubt we mean what the words attempt to indicate. We mean a doubt founded on reason and arising from the evidence or lack of evidence in the case. It is the kind of doubt that a reasonable person might have after carefully weighing all the evidence. It is a doubt which has substance and is not merely shadowy. A reasonable doubt is one that appeals to your reason, to your judgment, to your common sense and experience. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy. A reasonable doubt is such a doubt as would cause prudent people to hesitate before acting in the serious affairs of their own lives. To put that a little differently, if you are confronted or were confronted with an important decision and after reviewing carefully all the pertinent factors you were beset by doubt and uncertainty and were unsure of your judgment, then you would have what we try to define as a reasonable doubt.

Conversely, taking into account all the elements that might apply to some serious problem, if you had no uncertainty and no reservation about your judgment, then, in the sense we use these words, we would say you had no reasonable doubt.

Now proof beyond a reasonable doubt does not mean proof to a certainty or proof beyond all possible doubt.

If that were the rule, few people could ever be found guilty. It is practically impossible for a person to be absolutely and completely convinced of any disputed fact which is not susceptible of mathematical and absolute demonstration. So that kind of absolute certainty is not the test by the standard of reasonable doubt.

On the other hand, I trust you will realize from what I have said on this subject that the prosecution's burden of proof in this and any other criminal case is very high and that you may convict only if your mind is free of any such uncertainty or reservation as I have tried to describe to you in defining this conception.

Now against the background of these general principles that apply to any criminal case with us I want to turn to the indictment in which the charges that you are to consider are made, and I think the simplest thing, since it is not lengthy, is to read it to you.

The first count charges as follows, and I quote:

"1. On or about the 1st day of February 1968 Denneth Bass, the defendant, was convicted by a Court of a State of the United States, to wit, the Supreme Court of the State of New York, Bronx County, of a felony, to wit, attempted grand larceny in the second degree, in violation,"

and I end the quote there, of certain identified statutes of the State of New York.

Resuming the quote, Paragraph 2 says:

"On or about the 29th day of July 1969, in the Southern District of New York, Denneth Bass, the defendant, having been so convicted, unlawfully, wilfully and knowingly did possess a firearm, to wit, one 32-caliber Baretta automatic pistol."

End of quote of Count 1.

Now the second count is substantially similar. The first paragraph again charges the New York felony committed in February 1968.

The second paragraph, this time referring to July 30, the day after the preceding count, charges that having been convicted of the New York felony the defendant unlawfully, wilfully and knowingly did possess another firearm, to wit, a Stevens 12-gauge shotgun.

I come to Count 3, and I quote that :

"On or about the 29th day of July 1969, in the Southern District of New York, Denneth Bass, the defendant, unlawfully, wilfully and knowingly did carry a firearm during the commission of a felony which may be prosecuted in a court of the United States, to wit, the receipt, concealment and sale of a narcotic drug, in violation of,"

and I again end the quote and tell you that there are some cited Federal statutes of which it is alleged this receipt, concealment or sale of a narcotic drug was a violation.

Now, those are not complex charges, but to guide, and if I may say, govern your deliberations, I will now break those three counts down into what lawyers and judges, and perhaps even ordinary people, would call the elements of these offenses and undertake to define for you some of the things that may need defining.

As I have told you, the first two counts, which charge successive violations on July 29th and 30, 1969, are under a statute which says that a person who has been convicted of a State felony and who thereafter possesses any firearm is guilty of a Federal offense.

Accordingly, in order to convict under either or both of those counts you must be convicted beyond a reasonable doubt that the evidence establishes two facts or elements:

1. That on or about the 1st of February 1968 the defendant had been convicted by the Supreme Court of the State of New York of a felony; and

2. That on the day in question, in July 1969, having been so convicted, the defendant unlawfully, wilfully and knowingly possessed a firearm, namely, on July 29th, the alleged 32-caliber Baretta automatic pistol involved in Count 1. And, with respect to July 30th, the Stevens 12-gauge shotgun.

As to the first of these elements, the New York felony alleged to have been committed in February of 1968, you will recall that the parties have stipulated, have agreed, that that element is established, and you may so consider it for your purposes.

And that brings you to the second element, which is not complex, but I tell you one or two things about that:

First, the term "firearm" in the statute, which underlies this charge, or these charges, is defined as follows:

"Any weapon which will or is designed to or may readily be converted to, to expel a projectile by the action of an explosive. This term shall include any handgun, rifle or shotgun."

And I end the quotation there.

Further amplifying the first two counts, and as I will mention, this applies to the third as well, I remind you that the defendant is charged in each of them with having behaved wilfully and knowingly in committing the allegedly wrong things of which he is accused. Now, those words, "wilfully and knowingly," go to the critical factor of criminal intent. While their meaning is not especially complicated or mysterious, this factor of criminal intent is essential and the words require some brief definition.

We say that an act is done knowingly, in the sense that concerns us, if it is done voluntarily and purposely and not because of mistake or accident or negligence or some other innocent reason.

We say that an act is done wilfully if it is done knowingly and deliberately. The requirement of wilfulness does not mean that a defendant must have known that he was violating some particular statute or must have known the terms of the statute he is charged with having violated. It does mean that he must have acted with a bad or evil purpose to disobey or simply to disregard the criminal law.

I am sure you realize that this subject of knowledge and intent, while it is a factual subject, is one on which we normally do not have direct testimony. It is rarely possible to prove directly the operation of a person's mind, unless he tells them to us, and then you have a question of whether you believe what he tells you. But the normal procedure or means by which this question of intent is determined is on the basis of inferences from the circumstantial evidence. You may judge a defendant's intent or indeed anyone's intent, and here you may judge whether the defendant acted knowingly and wilfully, by considering all the evidence you have received concerning his conduct, his statements and all the surrounding circumstances at the time and in the place of the events in question. In the end, of course,

having made this kind of determination, you may not convict unless you are convinced beyond a reasonable doubt that the necessary intent, as I have tried to define it, has been established.

I return to the third count and the somewhat more elaborate elements of which it is comprised. This, you recall, is the charge that the defendant possessed a firearm during the commission of a Federal felony, here involving narcotics. This charge can be defined initially again in terms of two general elements, and then, to complicate it a bit, but ultimately to simplify it, each of these elements may be broken down somewhat, and I will undertake to do that for you reasonably briefly.

The first element of this third count is that on the date in question, July 29th, 1969, the defendant was unlawfully carrying a firearm. Now, for purposes of this third count, the word "firearm" has a definition that is substantially similar to the one I gave you before, but it is under a different statute and the word is slightly different. I quote:

" 'Firearm' in this statute means," and here I begin the quote:

"Any weapon which will, or is designed to, or may readily be converted to expel a projectile by the action of an explosive."

End quote.

And the definition simply ends there under this statute.

The second and more complex element in this third count is that the firearm must be proved to have been carried during the commission of the Federal felony described in this count, namely, the felony of either receiving or concealing or selling a narcotic drug. And I told you this element, in turn, requires some analysis. It may be defined in terms of the three elements of that narcotics offense.

First, that on the date in question, July 29, 1969, the defendant either received or concealed or sold a narcotic drug.

Second, that the substance or one of the substances in the packet or packets, which had been marked Government's Exhibit 6, I believe, in evidence, is in fact a narcotic drug.

Third, that the defendant at the time knew that this

narcotic drug had been unlawfully imported into the United States.

Now as to the first of these elements, receiving or concealing or selling, I have stated those disjunctively, separating the different things by the conjunction "or," and indicated to you that the Government must prove either receiving or concealing or selling of a narcotic drug.

You may recall that the indictment, following the rules for the drafting of indictments, alleges these things conjunctively. It says that he received and concealed and sold the narcotics. I instruct you now that under the law any one of those three things is sufficient to establish this first element, receiving or concealing or selling, provided of course that it is proved, as everything must be that is essential to the offense, to your satisfaction beyond a reasonable doubt.

I instruct you next in connection with this third count that heroin, as a matter of the law that governs all of us, is a narcotic drug. So if you find that heroin was the substance in the packets in Exhibit 6, this aspect of the offense is established.

I come then to the requirement that it be established that the defendant knew this heroin had been illegally imported into the United States. You undoubtedly recall that in this brief trial there has been no evidence bearing directly on that subject of illegal importation. I tell you now that under the applicable Federal law, however, if you find that the defendant had possession of the narcotics, and that substance was heroin, and if the evidence in the case does not provide a satisfactory explanation of that possession of some other kind, then you are permitted under the law to draw two inferences:

First, that this heroin had been imported illegally and, second, that the defendant knew it had been imported illegally into the United States.

Now I tell you that these inferences are ones that you are permitted to draw, and I mean exactly that, you are permitted but not required to draw these inferences.

The fact that inferences of this kind are authorized by the law is not meant to change the fundamental rule, about which I have talked so much, requiring proof beyond a

reasonable doubt. And it does not impose on a defendant the burden of producing proof that the narcotic drug was not unlawfully imported or the burden of producing any other evidence.

So when I speak of inferences that you may draw, should you find the unlawful possession, I mean only as I have stated, that such inferences are allowable where all the evidence does not supply an explanation satisfactory to you of the possession of the narcotic. You are to consider these permissible inferences in the light of all the evidence which has been offered in arriving at your conclusion, and keep in mind here and throughout the requirement of proof beyond a reasonable doubt.

Finally, I remind you that the third count charges behavior engaged in wilfully and knowingly, as to the first two counts. I remind you of the definition I gave you earlier, and I state to you again that that definition and this essential factor of criminal intent are applicable here with respect to the third count once again.

Now, moving on to some general thoughts that are intended to assist and guide your deliberations, I mention what must be an obvious subject in almost any criminal trial, the subject of credibility. You will recall that there are some conflicts in the evidence you have heard, conflicts between some of the things said by the Government's agents and some of the things reported by the defendant, who took the stand in his own behalf. You will understand that is a central and critical part of your function, and the function of most juries, to appraise the witnesses and determine the extent to which their testimony should be thought reliable for purposes of your task in arriving at the truth. There is nothing technical or legalistic about this problem of credibility, even though it is a standard subject in a judge's charge to a jury. Jurors come to the courtroom, under our system, reflecting our basic premise that people like yourselves will make the serious decisions, exercising the everyday common sense and your collective wisdom as you would in handling your own serious affairs.

You have heard the witnesses and you have watched while they gave their brief testimony. You will undoubtedly be asking yourselves now, as you review the testimony, how

each witness impressed you. Did he appear to be truthful and frank, candid, forthright, or did he seem evasive or shifty? Did he appear to know what he was talking about? And if he did, did he appear to have a purpose to report to you truthfully what he knew? Was he consistent or self-contradictory? How in general did his manner and the matter of his testimony on direct compare with the cross-examination? You will want to consider not only the intrinsic persuasiveness of each witness' testimony but the setting of that testimony in the whole case and the impact on your judgment of any contradictory testimony that you heard from any other witness.

Now, a witness may be impeached or discredited by contradictory evidence or by evidence that at times other than his appearance on the witness stand he made inconsistent statements, or by evidence that a witness has been convicted in the past of a felony. You have heard in this case of a prior conviction of the defendant—it relates to Counts 1 and 2 but in an undisputed fashion because that element of those counts you will recall has been stipulated. For the rest, you are permitted to consider that prior conviction as it may or may not in your judgment affect the defendant's credibility. It has no other significance for our purposes in this case.

If you believe that a witness has been discredited to any degree then you have the exclusive judgment as to what weight, if any, you will give to the testimony of that witness. If you find that any witness has deliberately lied about some material subject, that may lead you to disregard all his testimony or you may accept such portions of it as your good judgment leads you to accept.

I told you earlier, and it bears repetition, that no witness in our court is entitled to any special favor and no witness' testimony is entitled to any special weight because of the party who called him to the stand or because of his status or his employment. Specifically, the mere fact that a witness may be called by the Government or be employed by the Government does not in itself entitle the testimony of that witness to more weight than the testimony of any other witness. And that, as I am sure you realize and I trust appreciate, is simply a reflection of our basic principle that

everybody in our court is equal, at least at the outset, to everybody else.

Now all of us, I think, when we consider the criminal law, even briefly, think of the question of punishment. I must instruct you, however, again, as part of the division of our responsibilities, that this problem of punishment, if you should find the defendant guilty on any count, is a matter of exclusively for the Court, for me, just as the question of reaching a verdict on the facts is a matter exclusively for you. So the question of punishment or speculations about possible punishment is a matter that ought not to enter in any way into your deliberations.

Now when, in a very few minutes, you will go to the jury room, ladies and gentlemen, it is expected that you will have in mind that each member of the jury is entitled to his or her own opinion and is expected to express that opinion for the guidance and edification of his fellows. At the same time, and as part of that procedure obviously, it is expected that you will attend to the opinions of your fellow jurors. And this obviously is the essence of this kind of collective deliberation, the expectation that you will discuss and consider the evidence together and exchange arguments and views with your fellow jurors. It means that you present your own point of view and listen to others.

If after discussion with your fellow jurors you find that some view you initially held is erroneous, then you must not hesitate to change it in all good conscience. However, while you are expected fairly to consider all points of view that you hear in discussion, you are not expected to yield your own conscientious view simply because you may be outnumbered or outvoted or outshouted. Your vote should be determined in the end by what you are convinced in conscience is the correct way to decide the facts under the instructions I have given you.

I think you must know that in order to return a verdict you must be unanimous. I remind you, too, that there are separate counts or charges in this indictment and your verdict must address itself separately to each one of them and report a decision on each one.

As to the mechanics of your deliberations together, if you find that you are uncertain and need any of the testi-

mony you have heard repeated, send us a note and we will undertake to locate it in the stenographer's record and have it repeated to you.

If you find that you have need of any of the exhibits, send us a note about that and we will undertake to make them available to you.

If you discover that anything I have said in these instructions needs clarification or repetition, send a note about that and I will undertake to supply whatever it is you need of that nature.

Now, for what I trust will be the last time, I have to consult briefly with my lawyers, and I ask you to wait while I do that, to see if there is anything further.

Gentlemen, do you want to join me?

(The following took place at the side bar out of the hearing of the jury.)

THE COURT: Exceptions?

MR. FITZPATRICK: The only thing, maybe it was covered, I don't remember it, on the third count, whether or not selling the narcotics is a felony, the indictment reads that he carried a gun during the commission of a felony. Were they actually instructed that the sale of narcotics, if they found it was done, was a felony?

THE COURT: I gave them the elements. I told them what they do have to find.

MR. FITZPATRICK: They have to find he was committing a felony.

THE COURT: No; under my instructions they just have to find the elements as I gave them to them, unless Mr. Kessler wants to insist that I add the felony thing.

MR. KESSLER: No.

MR. FITZPATRICK: All right.

MR. KESSLER: No exceptions.

THE COURT: Anything else?

MR. KESSLER: No, your Honor.

\* \* \* \* \*

(Jury returned to the courtroom at 6:30 p.m.)

THE CLERK: Members of the jury, please answer as your name is called.

(Clerk calls names of jurors and they answer to their presence.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes, we have.

THE CLERK: How say you find the defendant Denneth Bass as charged in Count 1?

THE FORELADY: Guilty.

THE CLERK: And Count 2?

THE FORELADY: Guilty.

THE CLERK: And Count 3?

THE FORELADY: Not guilty.

THE CLERK: Members of the jury, listen to your verdict as it now stands recorded:

You say you find the defendant Denneth Bass guilty on Count 1, guilty on Count 2, not guilty on Count 3, and so say you all.

THE COURT: Do you wish the jury polled, Mr. Kessler?

MR. KESSLER: No, your Honor.

\* \* \* \* \*

THE COURT: I think that is fair enough and I will not take into account any indications that this man is a seller of narcotics in the imposition of sentence.

Mr. Bass, you have a right at this time to make a statement and I will hear anything that you want to say that might affect your sentence.

THE DEFENDANT: I don't have anything to say at this time.

THE COURT: When did you get out on bail, Mr. Bass?

THE DEFENDANT: I think it was about four or five days ago, about a week ago.

THE COURT: Now, I think that on the two charges on which you have been convicted, Mr. Bass, this Court has to consider this subject in connection with your State situation. As I understand it from this probation report, in 1967 you were sentenced for robbery, grand larceny and assault and possession of a weapon, and the sentence was suspended, but the report says you got one and one-quarter to two and a half years for that and you were put on probation.

Is that correct?

THE DEFENDANT: Yes.

THE COURT: And it also indicates that you are scheduled

to be heard next week, February 25 on the State probation violation that arises, I guess, out of the crimes you are charged with here; is that right?

THE DEFENDANT: I have no knowledge of this. I don't know of this.

THE COURT: Do you have any knowledge of this, Mr. Kessler?

MR. KESSLER: No, your Honor. Isn't there a violation pending? I think, your Honor, what Mr. Bass means is he was unaware of any date that had been set, he is aware that specifications of violation are set, but not aware of any date for hearing.

THE COURT: I won't take into account the narcotics thing, but I will, because I think I should, take into account the State probation setup and I am going to impose a sentence on this defendant on each of the two counts on which he was found guilty of 15 months, those sentences to run concurrently.

I don't know what the State authorities will do, but it is my judgment that the defendant ought to serve the term imposed under this Court's judgment as approximately the total for both the State and Federal claims against him.

Now, I mention that on the record, it doesn't have to be part of our judgment, for your guidance, Mr. Kessler, and yours, Mr. Bass, in this sense;

If the State imposes any prison sentence for the violation of probation, you are invited, Mr. Kessler, to file a motion with me for reconsideration or reduction, it being the intention of this Court that the 15 months should represent the total, so if there is any State sentence, you use your good judgment and you can either ask to have our judgment amended to contain a recommendation that the Federal sentence be served in the State Court, if that seems pertinent, or perhaps for a suitable reduction in the Federal sentence so that the total will be the total that I have indicated in my judgment ought to be imposed.

Now, I don't know to what extent you will have the power to regulate this and to what extent the State parole authorities may wish to take into account what I have said here, but I leave it to you to handle it on behalf of this defendant.

MR. KESSLER: I will make what you said known here to them.

UNITED STATES OF AMERICA

v.

DENNETH BASS, DEFENDANT

No. 68 Cr. 881

UNITED STATES DISTRICT COURT, S.D. NEW YORK.

FEB. 19, 1970.

Robt. M. Morgenthau, U.S. Atty., for the Southern District of New York, Thomas J. Fitzpatrick, Asst. U.S. Atty., of counsel for the Government.

Lawrence Kessler, New York City, for defendant.

MEMORANDUM

FRANKEL, District Judge.

Defendant has been found guilty by a jury under two counts of an indictment charging that on two specified occasions, having been previously convicted of a state felony, he possessed a firearm, thus violating 18 U.S.C. App. § 1202(a)(1). That statute says in pertinent part:

"Any person who \* \* \* has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony \* \* \* and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both."

It was stipulated that defendant had been convicted in the Supreme Court of New York, Bronx County, on or about February 1, 1968, of attempted grand larceny in the second degree, a felony. Thereafter, it was provided, on July 29 and July 30, 1969, he had in his possession a firearm, a pistol and then a shotgun, respectively.

There was no allegation in the indictment and no attempt by the prosecution to show that the possession of the firearm on either occasion transpired "in commerce or affecting commerce \* \* \*." The absence of this element, defendant now urges, vitiates the conviction. Contending that the statute was intended to reach possession of firearms by convicted felons only if such possession was shown in

fact to be "in commerce or affecting commerce," he moves for an order in arrest of judgment or for a judgment of acquittal.

For reasons which follow, the court holds erroneous the statutory construction upon which the motion is predicated.

To begin with, there is some modest, if by no means decisive, force in the government's grammatical analysis of the statutory text. The words "in commerce or affecting commerce" follow "transports," not "possesses," and there are words of approval in the books for the canon that such qualifying phrases, especially where the commas are arrayed like those here in question, should be deemed to relate only to the last antecedent. See *F. T. C. v. Mandel Brothers*, 359 U.S. 385, 389-390, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *T. I. McCormack Trucking Co. v. United States*, 298 F. Supp. 39, 41 (D.N.J.1969); 2 Sutherland, *Statutory Construction* § 4921 (3rd ed. 1953). As is often the case, however, see K. Llewellyn, *The Common Law Tradition* 522-28 (1960), there is a contradictory canon in defendant's arsenal: "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry. Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920); *United States v. Standard Brewery*, 251 U.S. 210, 218, 40 S.Ct. 139, 64 L.Ed. 229 (1920); *Buscaglia v. Bowie*, 139 F.2d 294, 296 (1st Cir. 1943); 2 Sutherland, *loc. cit. supra*.

Here, as elsewhere, then, the battle of canons and commas leaves us to seek for clues more promising to the legislative meaning.

The more substantial indicia in the statutory language and the pertinent, if somewhat sketchy, items of legislative history serve in total effect to refute defendant's argument. When the statute before us was enacted, the Congress and its constituencies were deeply disturbed by a recent history of horrible assassinations. At the same time the economic and human costs of individual and "organized" lawlessness were subjects of highly vocal concern. In that setting, the legislative findings are promptly intel-

ligible and apposite here. The statute reported, *inter alia*, these centrally significant judgments of legislative fact:

“\* \* \* that the receipt, possession, or transportation of a firearm by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce, [and]

(2) a threat to the safety of the President of the United States and Vice President of the United States \* \* \*.”

Both of the evils thus identified could be mitigated, and were intended to be mitigated, by forbidding possession of firearms to the specified classes of specially risky people; regardless of whether the possession itself occurred “in commerce or affecting commerce \* \* \*.” As was said by Senator Russell Long, sponsor of the amendment which became Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197:<sup>1</sup>

“\* \* \* Congress simply finds that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.

“You cannot do business in an area, and you certainly cannot do as much of its and do it as well as you like, if in

<sup>1</sup> Sections 1201 and 1202 of Title 18 U.S.C. App. were enacted as Title VII of the Omnibus Crime Control and Safe Streets Act. The bill which (after thorough transformation) became that Act, H.R. 5037, 90th Cong., 1st Sess., started its legislative career as a measure designed to aid state and local governments in law enforcement by financial and administrative assistance. See H.R. Rep. No. 488 90th Cong., 1st Sess. (July 17, 1967). This bill passed the House August 8, 1967, and went to the Senate. A similar bill was introduced in the Senate (S. 917) and went to the Committee on the Judiciary, which rewrote it completely. See S. Rep. No. 1097, 90th Cong., 2d Sess. (April 29, 1968). The amendments included much debated provisions regarding the admissibility of confessions, wiretapping and state firearms control.

On May 17, 1968, Senator Long introduced on the floor his amendment to S. 917, which he designated Title VII. His introductory remarks set forth the purpose of the amendment. 114 Cong. Rec. 13,867-69. About a week later he explained once again the proposed effect of the addition. There was brief debate; the reaction appeared favorable but cautious. Unexpectedly, however, there was a call for a vote, and Title VII passed without amendment or extended discussion. See 114 Cong. Rec. 14,772-75 (1968).

order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce." 114 Cong. Rec. 13,869 (1968).

Similarly, the recent deaths by gunshot of a President, a presidential candidate and a national civil rights leader gave tragic testimony that disturbed people carrying weapons did not have to cross state lines to pose grave threats with which the national government had occasion (and power) to cope.<sup>2</sup> See, e.g., 114 Cong. Rec. 13,868-13,871, 14,772-14,775 (1968) (Sen. Long); 114 Cong. Rec. 16,297 (1968) (Cong. Pollock).

The same day the Senate agreed to strike out the language of H.R. 5037 and substitute the text of S. 917 as amended. Following this, the new H.R. 5037 was passed by the Senate. The House passed it then on June 6, 1968, 114 Cong. Rec. 16,271-300, and it was signed by the President on June 19, 1968.

There is no need at this date in our history to document at length the power of Congress to reach intrastate occurrences which, in their voluminous and cumulative impact, may or do threaten the course of interstate commerce. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Katzenbach v. McClung*,

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<sup>2</sup> Senator Russell Long:

"\* \* \* we clearly have a right to protect the life of the President of the United States. What happened with regard to the assassination of President Kennedy is a very good example. So we set forth that the possession of weapons by people of the type I have described—a description broad enough to include Mr. Oswald—would be a threat to the safety of the President of the United States and a threat to the Vice President of the United States. We employ many Secret Service agents to protect the lives of the President and the Vice President from people of that sort. We have passed a law making it a Federal crime for one to assassinate the President. If we have a right to pass that law, we certainly have a right to take measures to protect the lives of the President and the Vice President.

"Then we say that the possession and transportation of firearms by these people is an impediment or a threat to the exercise of free speech and to the exercise of religion guaranteed by the first amendment to the Constitution of the United States. That clause, of course, could clearly pertain to this Government's right to protect citizens, such as Martin Luther King, who are

379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); *White v. United States*, 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928, 89 S.Ct. 260, 21 L.Ed.2d 266 (1968); *White v. United States*, 399 F.2d 813 (8th Cir. 1968). It is equally unnecessary to labor over the power to strike at dangers to the President or other federal officials whose security is a matter of "overwhelming" national concern. *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *In re Neagle*, 135 U.S. 1, 59, 10 S.Ct. 658, 34 L.Ed. 55 (1890). The defendant does not quite say, but tentatively hints, that there may be constitutional doubts about the statute as it has been defined to apply to his case. The court perceives no solid basis for such doubts.

It is concluded that the Congress could and did mean to reach cases like this one. Accordingly, defendant's motion is denied.

So ordered.

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expressing either religious or political views and whose life might be endangered because someone did not agree with what they were saying." 114 Cong. Rec. 13,869 (1968).

" \* \* \* this would make it apply to the gun Oswald had with which he killed John F. Kennedy.

"It would mean that Oswald \* \* \* would not have had the right to carry that gun or practice with it or do anything else with it.

"Assuming that \* \* \* this man Galt—a loser many times over, a felon, and an habitual criminal—was the man who killed Martin Luther King, this provision would have applied to him, too." 114 Cong.Rec. 14,773 (1968).

"While this, of course, could have saved every person who has been assassinated—certainly, it would not have saved my father—at the same time, it would apply to many of the most fiendish assassinations that have occurred in our time." 114 Cong.Rec. 14,774 (1968).

Congressman Pollock:

" \* \* \* we in this august body are faced with a somber and determined mood and temper of the Nation in the wake of riots and of the brutal, senseless slayings of Senator Robert F. Kennedy and Dr. Martin Luther King, a collective mood and temper which demand action \* \* \*." 114 Cong.Rec. 16,297 (1968).

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 204—SEPTEMBER TERM, 1970

(ARGUED SEPTEMBER 30, 1970, DECIDED NOVEMBER 30, 1970.)

DOCKET No. 34640

UNITED STATES OF AMERICA, APPELLEE

v.

DENNETH BASS, DEFENDANT-APPELLANT

Before: DANAHER,\* FRIENDLY AND HAYS, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge*, convicting appellant, after a jury trial, of two counts of possession of firearms in violation of 18 U.S.C. (Appendix) § 1202(a)(1) (Supp. V. 1970).

Reversed.

GERALD A. FEFFER (Milton Adler, Legal Aid Society, New York, New York, on the brief), *for Appellant*.

BOBBY C. LAWYER, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Thomas J. Fitzpatrick, Assistant United States Attorney, on the brief), *for Appellee*.

HAYS, *Circuit Judge*: This is an appeal from a judgment entered in the United States District Court for the Southern District of New York convicting appellant of two counts of possessing firearms in violation of 18 U.S.C. (Appendix) § 1202(a)(1) (Supp. V. 1970). Appellant was sentenced to fifteen months imprisonment on each of the two counts, the terms to run concurrently.

The indictment in this case stems from an investigation by a United States treasury agent of suspected narcotics violations by appellant. Agent George Jordan, acting in an

\* Senior Judge, Court of Appeals for the District of Columbia Circuit, sitting by designation.

undercover capacity, met the appellant at his home in order to arrange a purchase of narcotics. Appellant directed Jordan to the basement where the purchase was made from an unknown person. The following day, the agent returned and purchased a quantity of narcotics directly from appellant. At this time, the agent observed that appellant was carrying a Baretta automatic pistol. Jordan obtained an arrest warrant for appellant and a search warrant for appellant's apartment. He then proceeded to the apartment and, after being admitted, observed a sawed-off shotgun on a night table. At this time, other agents knocked on the door and announced themselves; appellant fled and was apprehended at the rear door by a waiting agent. The subsequent search of the apartment produced the Baretta, which was under a bathtub.

The statute under which appellant was convicted provides:

"(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both."

18 U.S.C. (Appendix) § 1202(a). (Supp. V. 1970).

It was stipulated at trial that defendant had been previously convicted of the felony of attempted grand larceny in the second degree, so as to place him within the scope of the statute. At trial, appellant did not deny ownership of

either the apartment or the weapons. His contention here is that as the government did not specifically allege and prove that the possession of the firearm was "in commerce or affecting commerce," the statutory requirements for conviction have not been fulfilled. Alternatively, defendant argues that should the statute be interpreted to allow conviction for possession of a firearm without proof of some connection with interstate commerce, it would be unconstitutional. Since we agree with the first contention and also with the second to the extent of believing that the Government's construction would create serious constitutional doubts, we reverse appellant's conviction.

# I

The controversy over the proper interpretation of the statute involves the question of whether the phrase "in commerce or affecting commerce" modifies "transports" alone or whether it also applies to receipt and possession. This question has plagued several district courts, with conflicting results.<sup>1</sup> In the only Court of Appeals decision interpreting the statute, *United States v. Daniels*, — F. 2d — (9th Cir. 1970), the Ninth Circuit affirmed the conviction, simply citing the opinion of the district court in the instant case, 308 F. Supp. 1385 (S.D.N.Y. 1970). At least part of the confusion can be attributed to a most unedifying and inadequate legislative history. Sections 1201 and 1202 of Title 18 U.S.C. (Appendix) were enacted as part of the Omnibus Crime Control and Safe Streets Act. After extended debate on numerous controversial issues, these two sections, known collectively as Title VII, were introduced on the floor by Senator Long. He twice set forth the purpose of the Amendment. 114 Cong. Rec. 13,867-69, 14,772-75, 90th Cong., 2d Sess. (1968). After his second speech, there was some brief debate; the few thoughts that were expressed seemed to favor the amendment in principle, but there appeared to be a desire for further study. Unex-

<sup>1</sup> *United States v. Harbin*, 313 F. Supp. 50 (N.D. Ind. 1970); *United States v. Francis*, Cr. No. 12,684 (E.D. Tenn., Dec. 12, 1969); *United States v. Phelps*, Cr. No. 14,465 (M.D. Tenn., Feb. 10, 1970); *United States v. Davis*, No. ORG 69126-K (N.D. Miss., July 2, 1970); *United States v. Vicary*, Cr. No. 44205 (E.D. Mich., June 29, 1970).

pectedly, however, a vote was called for, and Title VII passed with no further discussion, and no amendment.

Absent meaningful legislative history as to whether proof of some connection with interstate commerce was intended to be a prerequisite for prosecution for receipt and possession as well as transportation, the government relies on "one of the simplest canons of statutory construction," *United States ex rel. Santarelli v. Hughes*, 116 F.2d 613, 616 (3rd Cir. 1940), that is, that a limiting clause is deemed to apply solely to its last antecedent unless the subject matter requires a different construction. See *FTC v. Mandel Brothers Inc.*, 359 U.S. 385, 389 (1959). The word "transports," the government argues, is the only word modified by the commerce requirement, a conclusion which the government further supports by citing the arrangement of the commas. The argument, though it may be technically precise, leads to an illogical conclusion. Interpreting the commerce requirement to modify only the "transports" clause means that, although intrastate receipt and possession are punishable under the statute, intrastate transportation is not. Moreover if both "receipt" and "possession" are punishable without regard to the interstate elements, the modifying clause is meaningless, since there can scarcely be "transportation," whether intrastate or interstate, without an accompanying receipt or possession. Thus, in order to argue that a commerce requirement is not imposed by the statute on "receipt" or "possession," the government is forced to take the position that the commerce requirement of the statute is either totally illogical or mere surplusage.

It is considerably more probable that the commerce language was inserted to avoid questions of the scope of Congressional power and to mirror the approach to federal criminal jurisdiction reflected in many other federal statutes. See, e.g., 18 U.S.C. § 1951 (1964) (obstructing or affecting interstate commerce or movements of commodities in commerce by robbery or extortion); 18 U.S.C. § 875 (1964) (transmitting kidnapping or extortion threats by means of interstate commerce); 18 U.S.C. § 2421 (1964) (transporting women in interstate commerce for prostitution).

The government also attempts to support its reading of the statute by reference to Section 1201, which provides:

“The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce,

(2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.”

This provision was part of the original proposal offered by Senator Long on the floor of the Senate and accepted with no substantial discussion. 114 Cong. Rec. 13,867, 90th Cong., 2d Sess. (1968).

The section lists four separate threats posed by the receipt, possession or transportation of firearms, only one of which deals with burdens on interstate commerce. From this the government reasons that there was no intent to impose a commerce requirement. Although these “findings” may be designed to provide additional constitutional bases for the legislation, a matter which we shall deal with shortly, the incorporation of the commerce language into both Sections 1201 and 1202 indicates the fallacy of the contention that as a matter of statutory interpretation the other “findings” can support a conviction without a proof of a commerce connection. Once again, the government is left with the position that the language employed in Section 1202 is mere surplusage, a contention that is as unsatisfactory here as it was in the context of the government’s grammatical argument.

## II

One further factor compels us to interpret the statute as requiring a showing that receipt or possession must be in or affecting interstate commerce. Although grammatical statutory maxims have proved inadequate in this case, there remains the cardinal principle of both statutory construction and constitutional law requiring the interpretation of statutes, if possible,<sup>2</sup> to avoid a reading which would create serious constitutional doubts. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Justice Brandeis concurring); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *Lucas v. Alexander*, 279 U.S. 573, 577 (1929); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346 (1928); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). A situation in which, as here, an interpretation not entailing constitutional doubts can be reached independently, provides a particularly appropriate occasion for the application of the principle. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958).

There is serious doubt in the present case whether the statute, if given the interpretation for which the government contends, could withstand constitutional scrutiny. To establish constitutionality the government relies upon such cases as *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941). In each of these cases there is something more than the mere bald assertion that a particular activity is a burden on interstate commerce. For example, the statute involved in *Heart of Atlanta Motel v. United States*, *supra*, was carefully circumscribed to apply only to establishments providing lodging to transient guests, an activity which it was said, affects interstate commerce per se. In *Katzenbach v. McClung*, *supra*, only restaurants which served food, a substantial amount of which moved in commerce, or which served or offered to serve interstate trav-

<sup>2</sup> Resort to this principle of statutory construction in this case does not lead to "distortions of statutes and manipulations of narrow constitutional doctrines." Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 21 (1964).

elers, were subject to the statute. In *Maryland v. Wirtz*, *supra*, the only enterprises employees of which were covered by the statute were those which engaged in commerce or in production of goods for commerce.

*White v. United States*, 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928 (1968), relied on so heavily by the government, is factually distinct, even if we were inclined to accept its holding for purposes of determining this case. In the first place, Congress, in enacting the 1965 amendments to the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301-392 made findings based not on conjecture but on committee hearings. *White v. United States*, *supra* at 6. More importantly, the court itself recognized the distinct problems inherent in the field of drug regulation:

“Unlike many other objects of federal regulation, depressant and stimulant drugs are not an inert, passive substance, which, after use, pass into the realm of statistics of consumption. They exert an influence on the consumer, which may spell danger or disaster for people or property from or in other states. As for distribution Congress has acknowledged that attempts prior to 1965 to regulate proscribed interstate traffic have failed because of the impracticality and impossibility of determining source of origin identification.”  
395 F.2d at 7.

Even in *United States v. Perez*, 426 F.2d 1073 (2d Cir. 1970), there was at least some evidence that Congress probed the commerce clause basis of the statute and made substantial findings. 426 F.2d at 1078-80 and nn. 3-5. This may all be contrasted with the findings in this case, if indeed they may be so characterized. All that is present in the “debates” is statements by the bill’s author based on nothing but conjecture and a series of inferences which, if accepted, would support federal legislation concerning almost any criminal matter. 114 Cong. Rec., *supra*.

An interpretation of the statute that would allow prosecution for receipt or possession of firearms without a showing in each case that such receipt or possession was in or affecting interstate commerce would be an unprecedented extension of federal power. “There is no Supreme Court

case which suggests that Congress can ignore the requirement that some connection with interstate commerce must be established as a basis for conviction of a federal crime where the power of Congress to enact the statute is derived from the commerce clause." See discussion of *United States v. Denmark*, 346 U.S. 441 (1953) in *United States v. Perez*, *supra* at 1082-1083 (dissenting opinion).

Reliance on the "findings" in section 1201 will not suffice to avoid the constitutional difficulties. It should first be pointed out that the inclusion of the commerce finding, alone, in the body of section 1202 suggests that Congress as a whole regarded the commerce clause as the source of its authority in this matter. In any case, the three alternative "findings," like the "burden on commerce" finding, are nothing more than assertions that a constitutional basis for such legislation exists. It is simply not enough, however, to proclaim that receipt or possession of firearms impedes, for example, free speech; it might just as well be argued that burglary of a house of worship impedes religious freedom and that therefore, a federal offense can be fashioned. Surely we have a right to expect that were such a departure from basic principles of federalism in the area of criminal law intended, particularly on such novel and esoteric theories, more consideration would have been given to the statute before its enactment.

Thus, the only rational interpretation of the statute, and the only interpretation of the statute that can avoid otherwise serious constitutional doubts is that which requires that receipt and possession, as well as transportation, be shown, in each case, to have been "in commerce or affecting commerce."<sup>3</sup> Since such a showing was not made by the government in this case, appellant's conviction cannot stand.

Because of the result we have reached, there is no need to discuss appellant's further contention that the definition of "felony" in § 1202(c)(2) denies him the equal protection of the laws.

Reversed.

<sup>3</sup> Compare *Haynes v. United States*, 390 U.S. 85, 88, 98 (1968), where it is made apparent that the National Firearms Act was predicated upon an exercise of Congressional power in the field of taxation.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and seventy.

Present: Hon. JOHN A. DANAHER, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DENNETH BASS, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. DANIEL FUSARO, *Clerk.*

SUPREME COURT OF THE UNITED STATES

No. 1285- - - -, October Term, 1970

UNITED STATES,  
PETITIONER,

v.

DENNETH BASS

ORDER ALLOWING CERTIORARI. Filed March 29 -----, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second - - - - -Circuit is granted.